United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1071

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

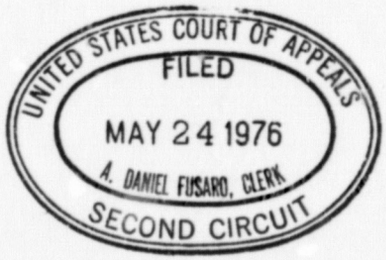
-against-

CALLIE V. BUSH,

Appellant.

REPLY BRIEF FOR APPELLANT
CALLIE V. BUSH

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- CALLIE V. BUSH, Appellant.	Docket No. 76-1071

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I

AS A MATTER OF STATUTORY AND COMMON LAW, APPELLANT IS ENTITLED TO A JURY TRIAL IN THE DISTRICT COURT ON CHARGES OF HAVING COMMITTED A PETTY OFFENSE.

In appellant's main brief it is argued that appellant was entitled to a trial by jury in the district court for the petty offence of obstruction of the mails, since longstanding practice of federal and common law afforded defendants a jury trial in the district court for

such offenses, and since Congress had never enacted any law denying such a right. The Government's response is two-fold: first, that jury trials have never been provided for those individuals accused of "petty offenses;" second, that Congress, through the classification of appellant's offense as "petty," has expressed its intention that appellant's offense be adjudicated without a jury.* Neither of these assertions withstands analysis.

In Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974), the Supreme Court most recently defined those crimes which, for purposes of the Constitutional right to a trial by jury, are "petty offenses." "[O]ur decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes."

Of course, appellant's crime, with a six month maximum term, is "petty" for purposes of Constitutional analysis. However, the fixed six month dividing line between

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* Respondent's additional contention that Congress, in its 1968 amendment of the Federal Magistrates Act, 18 U.S.C. §3401, and in the later promulgated Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, established that there is no right to a jury trial in petty offenses was answered in Appellant's Brief, pages 12-15.

petty and serious crimes has never in the past separated those crimes for which jury trials have been afforded in federal district courts. Rather, the federal courts, in accordance with ancient common law provisions, have afforded jury trials, even if not required by the Constitution, for all offenses, unless there is some Congressional provision for summary adjudication. Callan v. Wilson, 127 U.S. 540, 552-554 (1888); Smith v. United States, 128 F.2d 990 (5th Cir. 1942); see, Kaye, Petty Offenders Have No Peers, 26 U. Chi. L. Rev. 245, 247 (1959).

The validity of this position is most dramatically evinced by the practice of affording jury trials for defendants accused of the predecessor of the very "petty offense" involved in this case. R.S. §3995 (1898) (2d ed.) provided that "[A]ny person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same, shall, for every such offense, be punishable by a fine of not more than one hundred dollars." In spite of the unquestionably "petty" nature of the fine involved, and the total absence of any prison term as a consequence for violation of the statute, the crime was not disposed of summarily, but was tried in the district court with a jury. See, e.g., United States v. Sears, 55 F.268 (D. Ky 1893); United States v. Thomas, 55 F.380 (D. W. Va. 1893) (charge to jury); United States v. Claypool, 15 F. 127 (W.D. Mo. 1882) (charge to jury); United States v. Clark,

25 Fed. Cas. 443 (No. 14805) (E.D. Pa. 1877) (charge to jury).

Since obstruction of the mail -- an offense which is unquestionably "petty" for constitutional purposes -- has historically been tried by a jury, the Government's claim that there is no common law or statutory right to a jury trial for a petty crime is without merit.

Equally misplaced is the Government's arguendo position that appellant's jury trial right was extinguished by the enactment of 18 U.S.C. §1, which defines petty offenses, and which alledgedly indicates Congressional intent to do away with the previously existing practice of affording jury trials for appellant's offense.

18 U.S.C. §1 was derived from the Act of December 16, 1930, ch. 15, 46 Stat. 1029, which provided "That all offenses the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500 or both, shall be deemed to be petty offenses; and that all such petty offenses may be prosecuted upon information and complaint."* Not only is there nothing in the statute or the legislative

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* This section was amended to its present language by the Act of June 25, 1945, ch. 645 §1, 62 Stat. 684 (Effective September 1, 1948), by omitting the reference to prosecution upon indictment and complaint. According to the Reviser's Notes, the omission was undertaken because the same issue was covered by Rule7(a) of the Federal Rules of Criminal Proceudre. See Reviser's Notes to 18 U.S.C. §1 (1970).

history to suggest that this enactment was designed to restrict the right to a jury trial for such offenses, the opposite is the case, for the Congress, in passing the bill, specifically rejected the opportunity to eliminate jury trials for such offenses. Thus, in 1930, a Presidential Commission recommended that petty offenses be summarily prosecuted on complaint before commissioners who would, if the defendant pleaded not guilty, hold hearings and recommend conviction or acquittal; the cases would then be referred to the district judge for judgment and sentencing. As a companion bill for this measure, Congress proposed the present classification scheme of "petty offenses" embodied in 18 U.S.C. §1, to which the summary trials would apply. However, while the classification scheme was eventually enacted into law, the provision relating to non-jury trials for these "petty offenses" was passed only by the House of Representatives, was never reported out of the Senate Judiciary Committee and failed of enactment. Doub and Kestenbaum, Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality, 107 U. Pa. L. Rev. 443, 452-453 and n. 47-48 (1959); Schwartz, Federal Criminal Jurisdiction and Prosecutor's Discretion, 13 Law and Contemp. Prob., 64, 81-82 (1948); see, 72 Cong. Rec. 10071, 10094 (1930); Duke v. United States, 301 U.S. 492, 494-495 (1937). Thus, Congress

specifically rejected the opportunity to provide for non-jury trials for its newly-created category of petty offenses.* Since, prior to 1930, the offense of obstruction of the mails was tried by a jury, and since nothing in the classification scheme adopted in that year changed appellant's right, appellant is entitled to a jury trial in the district court for her petty offense.

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for appellant, the judgment of the district court must be reversed.

Respectfully submitted,

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* Moreover, even under the summary offense provision considered and rejected by the Congress, an accused might, if conviction were recommended by a Commissioner, demand a jury trial in the district court. See Schwartz, Federal Criminal Jurisdiction and Prosecutor's Discretion, 13 Law and Contemp. Prob. 64, 81-82 (1948).

CERTIFICATE OF SERVICE

May 24, 1976

I certify that a copy of this ~~brief and appendix~~ reply brief has been mailed to the United States Attorney for the Southern District of New York.

Howard L. Gottlieb